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No. 90-1029

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC.; J-E-S-P Co., Inc.; SHIELDS
BUSINESS MACHINES, INC.; MICRO-GRAPHIC SERVICES, INC.;
MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO.,
INC.; ROGER KATONA, D/B/A G & S ELECTRONICS; AMTECH
EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES,
INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA
PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A.
DATA CORP.; SEARLE ENTERPRISES, D/B/A MICRO IMAGE, INC.;
MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MI-
CROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of
Appeals For The Ninth Circuit

**BRIEF OF THE NATIONAL OFFICE MACHINE DEALERS
ASSOCIATION AND THE NATIONAL ASSOCIATION OF
SERVICE DEALERS AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether an equipment manufacturer, lacking sufficient market power in the interbrand market of equipment sales, can possess market power in the parts and service segment of the industry.

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INTEREST OF THE AMICUS CURIAE

The National Office Machine Dealers Association ("NOMDA") is a national and international organization representing approximately 6,500 independent business equipment and systems dealers. NOMDA is recognized as the major spokesperson for the industry. Premised upon NOMDA's commitment to service and integrity, one of NOMDA's principal organization goals is to assist its members in providing the highest level of pre-sale, point-of-sale, and post-sale support to end-users of sophisticated office products. NOMDA achieves these goals through education and guidance offered to its members over the past sixty-six years.

As a non-profit organization representing business equipment and systems dealers as well as manufacturers, NOMDA has a substantial interest in this litigation. It is NOMDA's position that absent an authorized dealer channel, parts should be made available to qualified technicians for service of end-users' equipment. In simplest terms, the owner of equipment, rather than the manufacturer, should decide who shall service the product. Anything to the contrary is illegal restraint.

This case involves the treatment of this issue under the Sherman Antitrust Act. Eastman Kodak Company ("Kodak") instituted and enforces a policy which effectively prevents any independent service organization ("ISO") from obtaining repair parts to be used for service of Kodak equipment in competition with Kodak. Through its refusal to sell parts to ISO's, Kodak has created a monopoly in the service of Kodak equipment by depriving end-users of the ability to choose a service organization. The absence of an authorized dealer channel enables Kodak to maintain a total monopoly on parts and service for Kodak products.

NOMDA's membership contains both ISO's and dealers authorized by a manufacturer to market and service highly technical products to end-users. This Court's decision will affect the ability of end-users to select the source for post-sale support of the products they purchase and the ability of independent service organizations to provide that support. In an already fragile economy, Kodak's practice serves to increase prices and the freedom of end-users to contract for service. Accordingly, NOMDA has a strong interest in the disposition of this case.¹

¹ The parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

STATEMENT

The Respondents in this case are ten ISO's who compete for service for all brands of micrographic and copier equipment. The ISO's competitor, Kodak, manufactures the equipment and directly markets the equipment, parts and service to end-users. The ISO's do not seek the right to sell Kodak equipment, only to service such equipment as requested by owners of that equipment.

Prior to 1985, ISO's were able to purchase parts from Kodak, at premium prices, pursuant to the policy stated in Kodak's Customer Equipment Service Division. Kodak's former policy provided, "Kodak will sell replacement parts to any party who intends to use them to repair Kodak equipment." JA 435² In reliance upon Kodak's policy and their ability to obtain parts, the Respondents went into direct competition with Kodak for the sale of used equipment and service of Kodak equipment.

After losing a substantial amount³ of service business to the competitive ISO's, Kodak implemented a change in its "Replacement Parts Principles" by eliminating the commitment to "sell replacement parts to any party who intends to use them to repair Kodak equipment." JA 435. Kodak further modified its terms of sale by limiting sales to the "dealers, distributors, and service outlets" which were "Kodak authorized."⁴ Brief for Appellants at 14, *Image Technical Service v. Kodak*, 903 F.2d 612 (1988) No. 88-2686. Kodak's policy of distributing parts to "Kodak authorized" dealers and distributors effectively means only direct distribution by Kodak, which unlike its competitors does not include "authorized dealers." Kodak's policy change insulates Kodak from all competitive forces for service of Kodak equipment through the

² See e.g., Joint Appendix ("JA"). Documents lodged with the Clerk "L".

³ In 1986, ISO's provided service to a number of large governmental and non-governmental entities; ISO customers included: Internal Revenue Service, U.S. Department of Agriculture, U.S. Veterans Administration, State of California, Commercial Trust, State Farm Insurance, Blue Cross Blue Shield of Minnesota, Dow Chemical, Mobil Oil, Pennzoil, Bechtel Corporation and Northern Pacific Railway. JA 488, 492-93, JA 546, 501, L 149-50, L 165. In addition, ISO's provided service to a wide range of less recognized Kodak equipment customers.

⁴ The term "authorized" implies a distributor or dealer who is trained by a manufacturer to provide pre-sale, point-of-sale, and post-sale support to customers.

elimination of the ISO's source of parts and denies the benefits of competition to Kodak end-users.

In 1987, the ISO's brought suit against Kodak alleging violation of Sections 1 and 2 of the Sherman Antitrust Act. Specifically, Respondents allege Kodak is engaging in a *per se* illegal tie-in arrangement through its refusal to sell parts to end-users unless the end-user agrees not to utilize the services of an ISO. Respondents also allege Kodak created a monopoly through their refusal to sell parts to ISO's, effectively eliminating all competition in the service market for Kodak manufactured equipment.

After filing their complaint in the District Court, Kodak filed a Motion for Summary Judgment. Following a brief and limited period of discovery, and without oral argument, Judge Schwartz granted Kodak's Motion for Summary Judgment. In his opinion, Judge Schwartz stated, "A Kodak customer...can buy parts if he simply owns Kodak equipment." *Image Technical Service, Inc. v. Eastman Kodak Co.*, No. C-87-1686 WWS at 5 (1988). Judge Schwartz' ruling and factual interpretation of the limited facts available at the summary judgment are clearly erroneous. The ISO's showed availability of parts was conditioned on the Kodak customer agreeing not to use an ISO for service of equipment. JA 428-29, L 140, L 143. Kodak repeatedly warned customers of the ISO's inability to purchase parts and the likely prospect of not obtaining service from ISO's. JA 465.

Respondent ISO's appealed Judge Schwartz's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded the case to the District Court, ruling the ISO's had presented sufficient evidence to withstand summary judgment. The Court of Appeals correctly found Kodak may have monopoly power in the interbrand market for parts and service which may have eliminated competition in the relevant market. While the Court of Appeals correctly found issues of fact existed, its decision mistakenly relied on Kodak's interpretation of the facts. Kodak alleged Respondents had conceded that equipment consumers consider the cost of parts and service when determining which brand of equipment to purchase. JA 823, JA 779-80. Kodak also alleged, and the Court of Appeals adopted the position, that Respondents acknowledged the fact that Kodak lacks market power in the interbrand market for equipment sales. Neither concession was made by Respondent in its brief or oral argument.

The Ninth Circuit noted interbrand competition in the equipment market may not negate the ISO's claim that Kodak has monopoly power in the parts market. (See, e.g. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480, n.3 (1986), modified 810 F.2d 1517 (1987), *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (1984).) The Ninth Circuit concluded the District Court's lack of consideration of the issue of market power prevented the trial court from being able to determine whether Kodak had monopoly power. Based on the limited evidence presented, the Ninth Circuit found it unlikely that Kodak's limited presence in the interbrand market precluded a finding of monopoly power in the parts market.

SUMMARY OF ARGUMENT

Because independent dealers are a key link in the chain of product distribution, the sales practices they adopt greatly affect the competitiveness of the market, manufacturer sales levels, and end-user satisfaction with their purchases. Dealers, as their name implies, are authorized by manufacturers to offer pre-sale, point-of-sale, and post-sale support for a manufacturer's product. In order to be authorized, a dealer is trained by a manufacturer or third party in the proper sale, service, and support of business equipment. ISO's are also trained on equipment either by a manufacturer as a technician or as an authorized dealer for a competing brand of equipment. An ISO network often is established where no authorized dealer channel exists or merely as an alternative to an authorized channel.

Most dealer appointments are non-exclusive, resulting in the dealer competing with other authorized dealers, as well as the direct marketing branch of the manufacturer, creating significant intrabrand as well as interbrand competition.

ISO's and authorized dealers provide significant intrabrand competition in the technologically complex business equipment and systems marketplace. Intrabrand competition affords an end-user a choice of service provided either by a dealer or the manufacturer. If a dealer offers non-competitive pricing or unsatisfactory service, the end-user should not be locked into one source for aftermarket service and support. Intrabrand competition benefits both end-users, who receive better service at lower prices, as well as dealers who add valuable services to the economy.

The absence of an authorized dealer channel eliminates this intrabrand competition. Kodak eliminated all intrabrand competition through its refusal to sell parts to customers who choose to use

ISO's. The ISO's presence created desired intrabrand competition, resulting in lowered Kodak service prices and improved service in those instances where ISO's and Kodak directly competed.⁵

All manufacturers have an interest in the proper maintenance of equipment after it is sold. ISO's have an equal interest in proper maintenance for it is the very foundation of their success. A service provider makes a substantial investment to establish and maintain a business and will not risk that investment through inferior service. Most importantly the end-user benefits from the freedom to choose who shall maintain the complex equipment owned.

For these reasons, it is appropriate to enforce *per se* liability rules to determine the legality of Kodak's tying arrangement. Kodak's blatant attempt to eliminate the ISO's from the service aftermarket by refusing to sell parts to end-users who choose ISO service allows Kodak to maintain a monopoly through an illegal tying arrangement. This tying arrangement prohibits competition in the parts and service after-markets.

ARGUMENT

The Ninth Circuit found sufficient basis to reverse the District Court's decision granting summary judgment. Respondents successfully presented triable issues of fact which remain disputed between the parties. The central issue in this case is whether an equipment manufacturer, lacking sufficient market power in the interbrand market of equipment sales, can possess market power in the parts and service segment of the industry. Respondents contend parts and service are separate markets from equipment sales where Kodak maintains monopoly power through the implementation of its tie-in arrangement. Kodak's policy has permitted them to establish prices without restraint and eliminate competition by refusing to sell the parts required to service the product.

⁵ The record and Court of Appeals recognized that service prices declined in those cases where Kodak directly competed against an ISO for service. *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 617 (1990).

THE ISO'S PRESENCE IN THE MARKET PROMOTES BOTH INTERBRAND AND INTRABRAND COMPETITION

Providing good service is competitively essential for a manufacturer or distributor of high technology products. Service represents future revenues through renewed maintenance agreements, equipment upgrades, sales of peripherals and future placements of additional equipment. A competitor who is unable to efficiently provide good quality service at affordable prices will soon find their customer seeking alternative sources for service or alternative products.

Many manufacturers choose to offer their products to the public through an authorized dealer channel. Dealers take on various names such as distributor, reseller, remarketer, or value-added reseller but all perform essentially the same duties for the authorizing manufacturer. The dealer channel provides pre-sale, point-of-sale, and post-sale support to the end-user. Dealers and their employees are trained by the manufacturer or a third party to market and support equipment to end-users.

Dealerships, although authorized by a manufacturer, are individual business entities independent from the manufacturer from which they purchase products for distribution. Most dealers are appointed as "non-exclusive". The term "non-exclusive" enables a manufacturer to appoint additional dealers or authorize additional channels of distribution to compete with the existing dealers.⁶

Kodak competitors who, like Kodak, wish to increase their market share of equipment sales, do so through intense interbrand competition among their dealers and intrabrand competition among all channels. Competition is present in distribution at two levels, manufacturers and dealers competing in the interbrand market, i.e. Kodak v. Canon, and dealers competing against other dealers for equipment placement and service in the intrabrand market (i.e. Canon v. Canon).

The vertical and horizontal competition described above also occurs in the parts and service aftermarket for high technology equipment. Intrabrand competition results from one manufacturer and a number of dealers competing to support the equipment sold.

⁶ Full service dealers provide a wide range of products and services to end-users. Discount retailers provide little or no service or support to equipment purchasers.

The dual competition, interbrand and intrabrand, affords an end-user, who is dissatisfied with their service provider, the opportunity to choose another source for service. Intrabrand competition maximizes end-user benefits such as efficient service, low prices and superior customer education. It further allows full market penetration through a number of independently owned and operated dealers competing against each other and their manufacturer for revenues from equipment sale and service.

A few manufacturers, such as Kodak, do not utilize an authorized dealer channel but choose instead to compete in the interbrand market by offering their products directly to the end-user. Kodak's decision to forego the dealer channel and directly market their products is not contested. (See, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 366 (1977), manufacturer refuses to sell product to competitor for distribution, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) manufacturer terminates dealer in equipment sales.) The right to directly distribute products cannot be disputed, however, this right cannot be transferred to aftermarket support of an end-user's equipment. Once sold to an end-user or leasing company, the equipment is no longer Kodak's property to control but becomes the possession of an end-use customer. The principles which support Kodak's right to refuse to deal with a competitor in equipment sales cease to apply. Kodak, through its arrangement of tying parts to service, attempts to extend its right to refuse to deal with competitors in equipment sales to its refusal to sell parts to ISO's. The refusal to sell parts to end-users, unless they agree not to use another service provider, results in a *per se* illegal tying arrangement.

MARKET SEPARATION OF PARTS AND SERVICE UNDER JEFFERSON PARISH

To determine whether a *per se* tying arrangement is present, this Court must first ascertain whether separate markets exist for the sale of equipment and the sale of parts and service. Kodak argues the sale of equipment encompasses the aftermarket sale of parts and service for Kodak equipment as derivative markets. In order to dispel this argument, the relative markets in which equipment, parts and service are sold must be considered. To assist in determining whether a tying arrangement is anti-competitive, this Court has considered whether "two separate products may be tied together and, if so, whether they have used their market power to

force" acceptance of the tying arrangement. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 18 (1984). The establishment of separate markets for each of the products is essential to establish Kodak has used its market power in parts to force Kodak end-users to purchase Kodak service.

A. Characteristics of Demand

To determine whether one or two products are involved in a tying arrangement, this Court has reviewed the characteristics of demand for the products. *Id.* at 19. Kodak claims the demand for parts is synonymous with the demand for service. This claim is without merit. Respondents have shown a separate demand for service exists when end-users have requested Kodak parts, but not requested Kodak service. JA. 428-429. On those occasions where customers made requests for Kodak parts, but not for Kodak service, Kodak agreed to sell the part only if the customer agreed not to use ISO service (i.e., the customer installs the part themselves). Where a customer or an ISO offers to buy a part, with service provided by an ISO, Kodak refused to fill the parts order. JA. 428-429. In implementing its parts policy, Kodak thus recognizes a separate demand for parts and service, and attempts to eliminate the demand. If there was no demand for parts without purchasing Kodak service, Kodak would have no need for a policy conditioning the sale of parts with the sale of Kodak service.⁷

Kodak's current parts policy, enacted on December 1, 1986, illustrates the separate demand for parts and service. Kodak's Terms of Sale provide that parts would only be sold to: "Kodak authorized...dealers, distributors and service outlets" and "other users who purchased equipment directly from Kodak and who service their own machines." Brief for Appellant at 14, *Image Technical Service, Inc. v. Kodak*, 903 F. 2d 612 (1990) No. 88-2686. The policy explicitly forbids the sale of parts to an end-user unless the end-user agrees not to use ISO service. The distinction between an end-user who installs his own parts and an end-user who chooses a trained ISO to install that same part is without basis and irrational. The distinction confirms the ISO's argument that a separate market for parts and service exists.

⁷ The separation of parts and service was acknowledged by Judge Wiggins in his majority opinion for the Ninth Circuit. He noted Kodak's policy for parts implied a desire separate from Kodak service, which implies separate markets. *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 616 (1990).

Kodak's brief acknowledges the existence of aftermarket Kodak service contracts to customers. Kodak provides service through (1) initial warranty; (2) annual service contracts; or (3) on a "per call" basis.⁸ PB at 3. The last two service arrangements are contracted separately from the sale of equipment and therefore, create a separate market after the initial equipment sale. Kodak, by virtue of its manufacture and sale of equipment to the end-user, demands that this Court support the elimination of competition in the equipment support aftermarket. This demand would eliminate intrabrand competition in equipment service.

B. Distinct Product Markets

In *Jefferson Parish*, this Court ruled a tying arrangement may not exist unless there is sufficient demand for the tying product (parts) separate from the tied product (service) to identify a distinct product market in which it is efficient to offer the tying product separate from the tied product. 466 U.S. 2, 22 (1984). By offering to service Kodak equipment, ISO's created a separate demand for Kodak parts exclusive of the demand for Kodak service. The ISO's presence in the service market for service of Kodak equipment creates intrabrand competition for parts and service. Intrabrand competition in turn creates a competitive market for service of equipment for end-users.

Kodak's single-market view of equipment sales encompassing all derivative markets is without merit when viewed in light of commercial realities. In *Dimidowich v. Bell & Howell*, the Ninth Circuit correctly recognized the existence of the service aftermarket:

[A]n owner of broken B & H micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from B & H or Comgraphic (depending on location) [both B & H repairers], that is obviously the market the owner faces. 803 F.2d 1473, 1481 n.3 (1986).

Market realities dictate demand in the three separate markets: the new equipment market; the parts market; and the service market. The demand in each of these markets is separate and distinct, as illustrated by Kodak equipment end-users' request for ISO service on their Kodak equipment. JA 411, JA 449, JA 462, JA 470-71, JA 504. End-users should continue to have the freedom they once

⁸ See e.g. Petitioner's Brief "PB".

enjoyed to select the service entity of their choice without Kodak's exercise of its monopoly power.

KODAK'S MARKET POWER IN PARTS AND SERVICE NEGATIVELY AFFECTS COMPETITION

In *Jefferson Parish*, this Court acknowledged the legality of offering two distinguishable services in a single transaction. 466 U.S. 2, 24 (1984). This Court concluded that, had the patients in *Jefferson Parish* been forced to purchase the services of a particular anesthesiologist (tying product) as a result of the hospital's market power, the arrangement would be considered anti-competitive. The patients in *Jefferson Parish* were able to choose another anesthesiologist if they desired. It is in this concept that distinguishes this case from *Jefferson Parish*. Respondents in this case have shown Kodak's policy to sell parts only to those customers who agree not to use ISO service has resulted in Kodak equipment user's purchase of Kodak service. Unlike the patients in *Jefferson Parish*, Kodak end-users have no choice.

Kodak's market power in parts forces the end-user to purchase the tied product, Kodak service. Unlike the tie-in in *Jefferson Parish*, Kodak's parts policy directly forecloses all competition for service of Kodak equipment. In *Jefferson Parish*, this Court correctly found the hospital had no relevant market power, as a patient could go to another hospital or another anesthesiologist if they did not want the anesthesiology services offered by the petitioner. Here, Kodak end-users are foreclosed from using any other service provider *except* Kodak, due to Kodak's market power in parts and service.

Kodak has forced its end-users to accept a tie which is anticompetitive and unprotected in light of *Jefferson Parish*. This Court stated, "tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made." *Id.* at 27. Unlike the patients in *Jefferson Parish*, Kodak customers have no choice of service provider after they purchase Kodak equipment. Due to Kodak's elimination of ISO's as contenders in the intrabrand market, and Kodak's failure to authorize a dealer channel for service support, no alternative service provider exists. The market effect of Kodak's tying arrangement eliminates any competition in the Kodak equipment support aftermarket thus forcing an end-user to purchase Kodak service when the end-user would prefer to buy Kodak parts for installation by another.

Respondents have shown the effect of Kodak's "forcing" through limited discovery conducted in this case, which indicated end-users were prevented from choosing ISO's equipment service once ISO's were unable to purchase parts. JA 465. Unlike the Petitioner's policy in *Jefferson Parish*, Kodak's tying arrangement significantly restrains the end-users' freedom to select a specific service provider through the elimination of any choice in the service market.

The recognition that some competitive advantages are justifiable in light of the competitive ideal has been established throughout recent antitrust precedents. In its decisions, this Court has noted when a seller's power is "used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive measures." *Id.* at 14. Insulation from competitive forces for uniform products are not protected by the Sherman Act. Competition, both interbrand and intrabrand, prevents an inferior product from being protected in the market. Kodak's tying of parts to service has eliminated intrabrand competition and enabled Kodak to market its inferior service to Kodak equipment owners free from the competitive presence of the ISO's. Respondents have offered evidence of superior ISO service when compared to Kodak service. L 133, JA 424-26. Comparative ISO service is not surprising considering most ISO's are factory trained Kodak technicians who were former Kodak employees. Kodak's measures to force ISO's out of the service market insulate Kodak service from ISO competition and helps to maintain their employment of technicians. The ISO's presence forced Kodak to compete on the merits of the services offered. Rather than lowering service prices and competing with ISO's, Kodak chose to curtail competition in order to maintain their profits without ISO interference.

KODAK EQUIPMENT OWNERS SUFFER FROM KODAK'S TYING ARRANGEMENT

To Kodak end-users, the elimination of ISO's from the service market meant increased prices and often inferior service.⁹ "The freedom to select the best bargain in the second market is impaired

⁹ As acknowledged by the Ninth Circuit, the ISO's provided evidence which showed they provided better quality service at prices less than Kodak. *Image Technical Service v. Kodak*, 903 F.2d 612, 617 (1990). Kodak employees also acknowledged the ISO's "good service" of Kodak equipment. Respondent's Brief at 13, L 180.

by a need to purchase the tying product, and the corresponding inability to evaluate the true cost of either product when available only as a package." *Jefferson Parish*, 466 U.S. at 15. Kodak's parts policy effectively eliminates the freedom to select the best choice in the second market. The alternative choice of an ISO for service provided a bargain for consumers, achieved through the competitive prices and service packages offered by ISO's. Intrabrand competition to provide service for Kodak equipment afforded consumers the freedom to choose the "best bargain" of either ISO or Kodak service.

Unlike other recent antitrust cases considered by this Court, this case involves a clear separation of products and the resultant market power necessary to create a tying arrangement causing "economic harm to competition in the tied market." *Id.* at 19, n. 31. The refusal to recognize the existence of an aftermarket for parts and service separate from equipment sales is unreasonable in an economy which is becoming more and more service oriented. Respondents provided evidence to the District Court that the price and quality of the tied product, service, was adversely affected by Kodak's restraint. The evidence offered sufficiently established that some Kodak equipment purchasers were forced to purchase Kodak service due to the anti-competitive effects of Kodak's tying arrangement.

COMPETITION IN THE INTERBRAND EQUIPMENT MARKET DOES NOT PRECLUDE VIOLATION OF THE SHERMAN ACT IN AN AFTERMARKET

The issue most often disputed in this case is the existence of market power — the ability of Kodak to exclude competition and set prices. This question is debated due to the requisite factors needed to establish violations of Sections 1 and 2 of the Sherman Act. This Court has found a tying arrangement is *per se* unreasonable if the defendant has sufficient market power in the tying product market to restrain competition appreciably in the tied product market. *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495 (1969).

Kodak and amici claim Kodak cannot possess market power in the parts and service after-markets due to Kodak's lack of market power in the interbrand equipment sales market. The Ninth Circuit in their majority opinion disagreed with Kodak's position by concluding in reality Kodak could have monopoly power in a single brand market. *Image Technical Service, Inc. v. Eastman Kodak*, 903 F.2d 612, 621 (1990). As discussed above, Respondent ISO's have

produced evidence demonstrating the existence of a separate demand for parts created by ISO service of Kodak equipment. The sole fact that ISO's operate as a business concern to service Kodak equipment demonstrates a separate market for parts and service. The ISO's further offer evidence of Kodak's ability to decrease prices in the parts and service aftermarkets where the parties engaged in direct competition. JA 420, JA 422, JA 474-75, JA 482; JA 514.

This Court has held the proper focus of concern hinges on "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *Fortner Enterprises, Inc. v. U.S. Steel*, 394, U.S. 495, 504 (1969). After considering this fact in light of the evidence offered by Respondents, the Ninth Circuit correctly found the issue of market power created a factual dispute which precluded summary judgment.

Kodak states it controls only a small portion of the interbrand market for the sale of micrographic and copier equipment. The ISO's dispute this statement, contending Kodak does have market power in two of the relevant markets. Kodak's dominance in the high end copier segment is well known. RB at 21-22.¹⁰ Kodak's competitors, Xerox, Savin, Canon, Ricoh, 3M, Bell & Howell and Minolta, each share a portion of the market in the sale of equipment. These manufacturers compete with Kodak for the sale of equipment in the interbrand market. None of Kodak's competitors or their dealers compete with Kodak in the sale of Kodak parts and service for Kodak equipment. The intense interbrand competition that exists in the sale of micrographic and photocopier equipment disappears in the product support aftermarket for Kodak equipment. The aftermarket of support for Kodak equipment is now exclusively controlled by Kodak as a result of the tying arrangement.

**LACK OF AN AUTHORIZED DEALER
CHANNEL ELIMINATES INTRABRAND
COMPETITION AND SECURES KODAK'S MARKET
POWER**

As NOMDA argued in its amicus brief in support of Respondent Sharp in *Business Electronics Corporation v. Sharp*, 485 U.S. 717 (1988), the authorized dealer channel or full service dealer

promotes intrabrand competition, which produces optimum service levels. Factory trained authorized dealers offer pre-sale, point-of-sale and post-sale service in competition with other dealers who market and service a specific brand of equipment. Direct marketers like Kodak and other manufacturers possess a vested interest in the proper maintenance of end-user equipment. Proper maintenance helps assure end-user satisfaction, and a satisfied customer will return for equipment upgrades, new equipment or extended maintenance agreements. It is therefore important to insure proper service is given to protect the goodwill associated with a manufacturer's name.

Both the dealer and manufacturer distribution channels market equipment and service to end-users. After the sale, equipment is installed at a user's location, and ceases being the manufacturer's property and becomes the end-user's property. Without an authorized dealer channel, Kodak customers have two choices for service; the consumer may service equipment themselves or have Kodak provide service. ISO's, when able to purchase Kodak parts, provided a third alternative which maintained intrabrand competition for the service of Kodak equipment.

A dealer who sells equipment but fails to offer competitive service may lose a maintenance contract and the potential for future sales to the manufacturer or another authorized dealer. Alternatively, intrabrand competition allows a dealer who did not competitively price equipment for sale the opportunity to market a service agreement to a end-user who purchased equipment elsewhere. Intrabrand competition allows them to purchase equipment from one dealer and service from another, thereby using market forces to achieve the best value for the their money.

The effect of Kodak's tie-in arrangement results in stifled intrabrand competition in the Kodak aftermarket for service and eliminates the end-user's freedom to choose. Prior to Kodak's policy change, ISO's provided end-users a much needed selection of service providers. The ISO's provided competent service to Kodak equipment owners in order to secure future service revenue. The intrabrand competition which resulted from ISO competition continued without interruption until Kodak began to lose service profits to the highly competitive ISO's. Kodak then instituted its tie-in arrangement to recapture service profits through the elimination of intrabrand service competition. Kodak ended the end-users right to choose and replaced it with its own.

¹⁰ See e.g. Respondent's Brief "RB".

Kodak's effective elimination of competition in the intrabrand market affords Kodak market power in the parts and service aftermarkets. This Court has condemned tying arrangements "when the seller has some special ability — usually called 'market power' — to force a purchaser to do something he would not do in a competitive market." *Jefferson Parish*, 466 U. S. at 14. Kodak end-users who purchased ISO service prior to Kodak's tying arrangement are now forced to purchase Kodak service. Kodak's tying of parts to service has brought about the ISO's demise as a viable competitor in the service market of Kodak equipment. Kodak in effect forces the end-user into purchasing parts they would prefer to purchase elsewhere. See *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1340-41 (1984). The ISO's presence in the service market brought about intrabrand competition which prevented Kodak from possessing the power to force a purchaser to do something he would not do in a competitive market. Specifically, the ISO's intrabrand competition prevented Kodak from forcing a customer to purchase Kodak service. It is the complete lack of competition in the intrabrand market for service of Kodak equipment which grants Kodak the special ability to create an illegal tying arrangement.

THE DECISION BELOW SUPPORTS COMPETITION AND ESTABLISHES A FACTUAL INQUIRY ON THE MERITS OF THE CASE

The intense interbrand and intrabrand competition in the business equipment and systems industry promotes technical advancements and consumer benefits such as lower prices, education and exceptional product service. The Court of Appeals, recognizing the importance of intrabrand competition, reversed the District Court's summary judgment decision and remanded this case for trial on the merits. Kodak, in its brief argues summary judgment is proper if plaintiff's claim is contrary to "economic sense." PB at 29 citing *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U. S. 574 (1986). At issue in this case is whether Kodak's theory of market power or the ISO's theory of market power makes "economic sense." Each party argues their interpretation of market power is correct, creating a triable issue of fact which should not be dismissed.

The Ninth Circuit correctly found price competition in aftermarket service to be sufficient evidence of market power to withstand summary judgment. Kodak and amici suggest that Respondents produce market analysis to survive summary judgment.

PB at 21. This suggestion is overly burdensome and in direct conflict with this Court's opinion in *United States v. Loews*, which provided, "it should seldom be necessary in a tie-in sale case to embark upon a full scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of seller's percentage share in that market." *United States v. Loews*, 371 U.S. 38 (1962), cited by *Digidyne Corp v. Data General Corp.*, 734 F.2d 1336, 1340 (1984). Respondent's evidence of market and monopoly power in the tying product (parts) is sufficient to restrain competition in the relevant (tied) service market. To determine otherwise could have staggering effects on the viability of future antitrust claims.

It is not implausible to imagine that any manufacturer faced with eroding profit margins on equipment sales would turn to service as a source to increase its revenues. To do so the manufacturer may terminate their authorized dealer channel and begin to exclusively provide service for its own brand of products. A decision determining Respondent's failure to present a triable issue of fact would preclude dealers or other authorized distribution channels from bringing suit should their manufacturer follow Kodak's example and foreclose intrabrand competition. Manufacturers could be empowered to eliminate all intrabrand competition based on the premise each lacks market power in the relative interbrand market of equipment sales.

The evidence Respondents provide, namely that Kodak has sufficient power in the parts market to force customers to purchase its service illustrates that there is more than "some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The standard Kodak asks this Court to impose would establish an onerous burden on Respondent to survive summary judgment through in depth market analysis illustrating that the effects of market imperfections in contradiction with other decisions.

KODAK'S BUSINESS JUSTIFICATIONS DO NOT PRECLUDE SECTION 2 LIABILITY

Section 2 of the Sherman Act prohibits monopolies through unlawful means. Business activities which are considered anticompetitive or exclusionary are prohibited conduct for a monopolist. Respondents argue that Kodak's anticompetitive actions of tying parts to service constitutes a violation of Section 2. In *Aspen Skiing*

Co. v. Aspen Highland Skiing Co., 472 U.S. 585 (1985), a competitor with anti-competitive motives instituted a policy change which resulted in a change of character of the market. This Court in *Aspen* was not persuaded by the Petitioner's "normal business justification" argument to condone its actions. On the contrary, this Court found "the evidence supports an inference that [defendant] was not motivated by efficiency concerns." *Id.* at 610. Kodak argues its business justifications, namely, "promoting high quality service, reducing inventory costs and eliminating free riding were brushed aside" by the Ninth Circuit. PB at 38. The Ninth Circuit found Kodak's first two business justifications to be "pretextual" and "not genuine" and therefore remanded the case to the District Court.

The Ninth Circuit correctly discredited Kodak's business justifications due to the ISO's specific skills and the timeliness of the tying arrangement. Kodak's claimed interest in providing well trained technical staff to provide support of equipment is a legitimate concern to all manufacturers. Kodak, however, is narrow minded in its view that only the equipment manufacturer is able to provide the high caliber service necessary to properly support Kodak products. Kodak's competitors in the interbrand market of equipment sales provide service support for their brand of equipment through an authorized dealer channel. The manufacturer trains the dealer in the proper care and maintenance of equipment and then allows the dealer to compete for service in order to insure high quality support of equipment. In absence of the authorized dealer channel, when able to purchase Kodak parts, ISO's were able to provide high quality service of Kodak equipment. The ISO's, many of them former Kodak employees, bring years of experience and factory training by Kodak to their customers.

ISO's, like Kodak, have a strong interest in providing high quality service to Kodak customers. Like an authorized dealer, if an ISO fails to properly maintain equipment, they run the risk of losing future service revenues. ISO's, as their name implies, are strictly service organizations dedicated to the service of equipment. As strictly a service provider, ISO's must rely on their superior service to insure customer satisfaction and future revenues. ISO's must overcome the burden that they are not authorized service providers and are therefore, forced to provide outstanding service in order to compete effectively against Kodak. NOMDA does not object to reasonable requirements or standards established for ISO's by Kodak. NOMDA'S objection is to the total elimination of ISO's from the marketplace.

Kodak alleges the elimination of ISO's reduces parts inventory which justifies the tying arrangement. This argument is without merit, as Kodak's parts inventory is directly related to the number of Kodak machines placed with end-users. The elimination of the ISO's will not decrease Kodak's parts inventory. Instead, customers who are forced to use Kodak service will no longer obtain parts from ISO's but instead purchase parts from Kodak. Rather than selling parts to ISO's, Kodak will inventory all parts for all end-users and increase inventory due to the lack of parts purchases from ISO's. The quantity of parts required to be maintained by Kodak depends directly on product reliability not the existence of ISO's.

Petitioners' brief contends Kodak's refusal to sell parts to ISO's eliminates free riding. Free riding is an undesirable market phenomenon which allows a dealer to benefit from another party's services, thereby omitting capital expenditures to develop their own services. It is difficult to apply the term "free riding" to the ISO's practice of purchasing Kodak parts. In its Amicus Curiae Brief on behalf of Respondent in *Business Electronics Corporation v. Sharp Electronics Corp.*, NOMDA condemned the Petitioner free rider who offered no services themselves. "Instead free riders divert buyers who have taken advantage of another dealer's services, offering prices that are lower because they do not reflect the true cost of making a sale." Amicus Brief for Respondent at 6, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) No. 85-1910. There are few similarities between the free rider criticized in Sharp and the ISO's service of Kodak equipment. The free rider in Sharp took advantage of the pre-sale, point-of-sale and post-sale services offered by a full service dealer in equipment sales. Without providing any support, the free rider in Sharp cut prices in equipment sales after diverting customers who had taken advantage of another dealer's services. Respondent ISO's do not partake of any actions similar to the free rider in Sharp. ISO's as Kodak parts customers, paid premium prices to obtain Kodak parts. In reality Kodak is merely relabeling its inventory argument which has previously been invalidated. The analogy of ISO's free riding as Kodak's subsidizing ISO's parts purchases is without basis. There is nothing "free" about ISO's purchases of parts from Kodak.

NOMDA and NASD conclude that the lack of intrabrand competition in the parts and service aftermarkets equips Kodak with market power to eliminate competition and the benefits competition brings. Dealers would welcome a decision in this case recognizing that parts and service are separate markets than that of equipment sales. By doing so, this Court would insure the existence

of dealers as future service providers should manufacturers choose to eliminate the dealer channel in equipment sales. Because manufacturers such as Kodak are not obligated to distribute products through dealers in the interbrand market, this Court's decision recognizing separate markets and the subsequent market power which exists from a single source of distribution, will protect the dealer channel as service providers for aftermarket support of equipment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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